

**IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES**

**DDT No.171/2011**

**BETWEEN:** **George Joseph**  
**Plaintiff**

**AND:** **Bluescope Steel (AIS) Pty Limited**  
**First Defendant/Cross-Claimant**

**AND:** **Amaca Pty. Limited**  
**First Cross Defendant**

**AND:** **Wallaby Grip Limited**  
**Second Cross-Defendant**

**AND:** **Wallaby Grip (BAE) Pty Limited (In liquidation)**

**Amended CONTRIBUTIONS ASSESSMENT DETERMINATION**

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to clause 49(1) of the Dust Diseases Tribunal Regulations 2007 (hereinafter referred to as "the Regulations") for a determination of apportionment as between the Defendant and the Cross Defendants.
2. Under Regulation 49, I am to assume that the Defendant and the Cross Defendants are each liable, to have regard to the Plaintiff's Statement of Particulars and the Defendant and Cross Defendants' Replies, and there after apply the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 (hereinafter referred to as the "Standard Presumptions Order") which provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.
3. George Joseph (hereinafter referred to as the Plaintiff) issued a Statement of Claim on 30<sup>th</sup> June 2011 claiming damages against Bluescope Steel (AIS) Pty Limited (hereinafter referred to as "Bluescope") in respect of his exposure to asbestos dust and fibre while employed by Bluescope. The Plaintiff alleges a mesothelioma condition.
4. On 27<sup>th</sup> July 2011 the Plaintiff amended his Statement of Claim and alleged his employment with Bluescope occurred at Port Kembla, and that he was exposed to asbestos dust and fibre:
  - (i) Between 26.4.1965 to 22.5.1965 (i.e. 4 weeks) in the Machine shop;
  - (ii) Between 21.6.65 to 23.6.1967 (i.e. 12 years) in the Boiler House;
  - (iii) Between 23.7.1967 to 5.7.90 (i.e. 13 years)

5. The Plaintiff filed a Statement of Particulars on 15<sup>th</sup> July 2011, and asserted:
  - (i) That he had been exposed to asbestos during the whole of his period of employment with Bluescope;
  - (ii) That his exposure to asbestos occurred on a daily basis and that the level or intensity of exposure was high;
  - (iii) The Plaintiff's exposure to asbestos was as a result of working in the vicinity of others who were working with asbestos;
  - (iv) In support of his claims the Plaintiff relied upon his affidavit sworn on 9.7.2011 in which he asserted that he was present when work was done by others who used/replaced asbestos in the machine shop, he inspected the brakes of the cranes in the Tin Mill.
  - (v) The Plaintiff relies upon
    - i. The Statement of Ronald Hillard, who recalls working specifically with James Hardie brand block asbestos, that in the Machine Shop and throughout the entire factory were pipes lagged with asbestos, that there was asbestos in the Tin Mill.
    - ii. The Affidavit of Giuseppe Petrozini who was employed by Bluescope, who identified various "Bestobell" products, 85% magnesia pipe section,
    - iii. The Affidavit of Harry Smith, in proceedings against Bluescope identifying the use of asbestos at the premises of Bluescope Steel, and
    - iv. The Answers to Interrogatories in the matter of Petrozini completed by Bluescope in which it identifies that Bestobell and Bell's asbestos rope tape gaskets, Hardie's Super HT insulation board, K-lite and Millboard were used at the factories..
  
6. Bluescope issued a Cross-Claim on 20<sup>th</sup> July 2011, against Amaca Pty Limited (hereinafter referred to as "Amaca"), Wallaby Grip Limited (hereinafter referred to as "WGL") and Wallaby Grip (BAE) Pty Limited In liquidation (hereinafter referred to as "BAE") claiming contribution or indemnity in respect of the claim made by the Plaintiff against Bluescope.
  
7. WGL and BAE although separate Defendants, will be treated by me as one Defendant as they at no stage overlap. Hereinafter I refer to WGL and BAE as "Wallaby Grip".
  
8. Bluescope has provided a Reply and relevantly asserts the following:
  - (a) That exposure and thus causation are seriously placed in issue;
  - (b) Bluescope should be placed in Category 2, while Amaca and Wallaby Grip should be placed in Category 1;
  - (c) The Plaintiff's assertions as to exposure are directly in issue, and in particular as to the exposure of the Plaintiff to asbestos dust or fibre while employed by Bluescope.
  
9. Amaca provided a Reply filed on 1<sup>st</sup> August 2011 which asserts the following:
  - (a) The Plaintiff does not know if he was exposed to asbestos dust and fibres.
  - (b) The Plaintiff has not provided any evidence as to the nature and extent of his exposure. He cannot identify any asbestos containing products or dust;
  - (c) That Amaca is an Innocent bystander within Clause 53 of the Regulations (In this regard I note the comments in *Stavar –v- Caltex Refineries (Qld) Pty Limited (No 3) 2008 NSWDDT 27 at [9] per O'Meally P*).
  - (d) Amaca, Wallaby Grip should be placed in Category 1;
  - (e) Bluescope should be placed in both Category 1 and Category 2.
  
10. Wallaby Grip filed a Reply dated 2<sup>nd</sup> August 2011 and relevant facts asserted are as follows:

- (a) By reason of the fact that there was no overlap, Wallaby Grip should be treated as one Defendant;
  - (b) That according to Professor Breslin's report the Plaintiff asserted that he did not use asbestos gloves, aprons, blankets or tape while employed by Bluescope. Indeed Professor Breslin concluded that the Plaintiff had "definite though passive asbestos exposure during his 26 to 27 years at the BHP Steelworks"
  - (c) It did not supply asbestos composition to Bluescope, but did supply to the general market certain asbestos products manufactured by Amaca.
  - (d) That Amaca supplied asbestos composition to Bluescope.
  - (e) Statements of Mr. Hillard and Mr. Cross support the allegation that Amaca supplied the asbestos composition to Bluescope.
  - (f) Amaca, Wallaby Grip should be placed in Category 1;
  - (g) Bluescope should be placed in both Category 1 and Category 2.
  - (h) The standard presumptions should be varied against Bluescope by 20%.
  - (i) That the Plaintiff's exposure occurred as to 55% during period B, and 45% during period C;
  - (j) Apportionment should be Bluescope 62%, WGL/BAE 4%, Amaca 34%.
  - (k) The main exposure occurred at the Power House.
11. There is little if any direct evidence of the Plaintiff being exposed to asbestos dust or fibre while employed by Bluescope. The Plaintiff gave evidence and was cross-examined and I have before me the Transcript of that evidence, which adds little as to the nature, extent or occasions when the Plaintiff was exposed to asbestos dust and fibre while employed by Bluescope, nor does it assist in identifying any supplier of asbestos products used by Bluescope. However, I am bound to accept the Plaintiff's assertions in his Statement in this regard.
  12. Initially the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) and make a determination of what proportion of the whole each separate period bears, having regard to the number of such periods and the length of each period, the duration of and intensity of exposure to asbestos present in each such period. It is thus not appropriate to determine the relative contributions simply on the basis of the elapsed years between the various periods of exposure.
  13. In the present case, I am forced to deal with the question of the periods of exposure solely on the material provided by the Plaintiff. On the Plaintiff's material before me, I determine that the 60% of the Plaintiff's exposure occurred during Period B, and 40% occurred during Period C.
  14. Any exposure between 1 January 1961 and 31 December 1978 falls within Period B of the Standard Presumptions Order, whereby a Category 1 defendant is presumed to be 65% responsible and a Category 2 defendant 35% responsible. Any exposure between 1 January 1979 and 31 December 1989 comes within Period C of the Standard Presumptions Order whereby a Category 1 defendant is to receive 60% of the liability and a Category 2 defendant, 40% of the liability.
  15. In the present case, notwithstanding the fact that there may have been some exposure beyond 31 December 1989, I have treated any exposure after 1<sup>st</sup> January 1979 and the cessation of employment as having occurred during Period C.
  16. I determine that Amaca, Wallaby Grip fall into Category 1 and that Bluescope falls into Category 2.
  17. In the present case the Standard Presumption takes into account the various aspects of the liability of Blue Scope and Amaca and Wallaby Grip and accordingly, there should be no variation of the Standard Presumption.
  18. I determine that Amaca and Wallaby Grip should be equal in their liability.
  19. It is apparent from the material placed before me, insofar as any asbestos used by Bluescope, that it is not demonstrated to me that more than 50% of that asbestos to which the Plaintiff may have been exposed did not come from either Amaca or Wallaby Grip and that accordingly, in respect of that proportion, Bluescope must bear sole responsibility.
  20. Thus, the following calculation as to liability can be made:

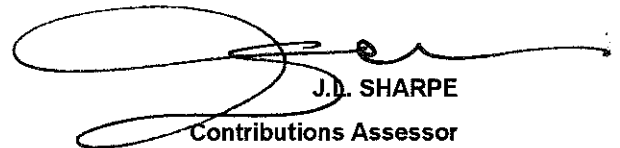
(a) Bluescope – 50% + 60% (period B) x 50% x 35% = <b>10.5%</b> + 40% (Period C) x 50% x 40% = <b>8%</b>	68.5%
(b) Amaca – 50% x 60% (Period B) x 65% x 50% = <b>9.75</b> + 50% x 40% (Period C) x 60% x 50% = <b>6%</b>	15.75%
(c) Wallaby Grip 50% x 60% (Period B) x 65% x 50% = <b>9.75</b> + 50% x 40% x 60% x 50% = <b>6%</b>	15.75%

21. Therefore, I determine the total liability of the Defendants and the Cross-Defendants as follows:

(a) Bluescope	<b>68.5%</b>
(b) Amaca	<b>15.75%</b>
(c) Wallaby Grip	<b>15.75%</b>
Total	<b>100%</b>

22. The Determination made by me on 2<sup>nd</sup> August 2011, has been amended under the slip rule.

23. Pursuant to clause 61 of the Regulations, I appoint Bluescope as the Single Claims Manager as it is the primary Defendant defined under clause 61(9):

  
**J.D. SHARPE**  
**Contributions Assessor**

4 August 2011